

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 02-0571
Withholding Taxes
For the Year 2000

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ISSUE

I. Withholding Tax Levies Against Taxpayer as Responsible Corporate Officer.

Authority: IC 6-3-4-8(g); IC 6-8.1-5-1(b); Indiana Dept. of Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

Taxpayer protests the assessment of tax levies based upon the presumption that taxpayer, as corporate vice president, functioned as a responsible officer for a now bankrupt computer software corporation. Taxpayer maintains that during the year in which he held the office of vice president, he was not responsible for decisions regarding payment of bills, payroll, or any other financial matters and should not now be held responsible for the unpaid withholding taxes.

STATEMENT OF FACTS

In 1999, a now-defunct computer software company was formed in Indiana. One thousand shares of common stock were issued. The president of the company and his family owned the majority of the shares. The secretary/treasurer owned 30 percent of the shares. Taxpayer owned the remaining 13 percent of the shares. The president and secretary/treasurer were full-time employees of the company. Taxpayer indicates that the company failed, ceased operations, and entered into bankruptcy approximately eight months after it was formed.

In 2002, the Department of Revenue (Department) sent taxpayer notices of unpaid withholding taxes apparently on the ground that taxpayer was a responsible officer of the company. Taxpayer submitted a protest, and an administrative hearing was conducted during which taxpayer explained the basis for his protest. This Letter of Findings results.

DISCUSSION

I. Withholding Tax Levies Against Taxpayer as Responsible Corporate Officer.

Withholding taxes may be assessed against a responsible officer under the provisions of IC 6-3-4-8(g) which state that "[i]n the case of a corporate or partnership employer, every officer, employee, or member of such employee, who, as such officer, employee, or member is under a

duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.”

Taxpayer raises the issue of whether, under IC 6-3-4-8(g), taxpayer was a responsible corporate officer who had the authority to see that the withholding taxes were paid.

Pursuant to Indiana Dept. of Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995), three factors are relevant in determining if taxpayer had that authority. The court looks to the person’s position within the power structure of the corporation. Where that person is a high ranking corporate officer within the power structure, that officer is presumed to have had sufficient control over the company’s finances to give rise to a duty to remit trust taxes. The presumption may be rebutted by a showing the officer did not in fact have that authority.

Second, the court will look to the authority of the officer as established by the articles of incorporation, bylaws, or employment contract.

Third, the court will consider whether the person actually exercised control over the finances of the business including whether the person controlled the corporate bank account, signed corporate check and tax returns, or determined when and in what order to pay creditors.

Under IC 6-8.1-5-1(b), the “notice of proposed assessment is prima facie evidence that the department’s claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.” Therefore, taxpayer has the burden on demonstrating that as a high-ranking officer of the defunct software company, he is not now responsible for the company’s unpaid withholding taxes.

The available documentation indicates that taxpayer advanced money in the form of start-up loans to the company. That same information indicates taxpayer eventually purchased 13 percent of the company’s common stock. At some time early in the company’s brief history, taxpayer was designated – at the behest of the company’s other officers – as “vice president of operations.” Shortly thereafter, taxpayer agreed to counter-sign for a substantial bank loan for which – following the company’s demise – taxpayer found himself personally and solely liable.

This appears to be the extent of taxpayer’s involvement with the company. Taxpayer apparently had no knowledge of the manner in which the company’s assets were dissipated. There is evidence to indicate that the company’s two operating officers and full-time employees – the president and the secretary/treasurer – unilaterally authorized loans, salaries, and unidentified payments in their favor. These salaries, loans, and payments largely depleted the company’s financial resources and were made without the consent or knowledge of the taxpayer. There is information to indicate that the two operating officers hired employees, agreed to pay the employees liberal salaries, and – on at least one occasion – awarded a large severance payment. This is no indication taxpayer ever received any benefit – financial or otherwise – from the company.

From the day-to-day financial records, it is possible to arrive at a conclusion that the company’s assets were mismanaged from the date of the company’s inception; the company never made a

single sale of its software product; the two operating officers used company assets for their personal benefit; and the taxpayer did not agree to or have knowledge of the decisions which – on their face – rapidly brought about the failure of the company.

Despite taxpayer's corporate officer status, the available information indicates that taxpayer had no knowledge of and was uninvolved in the company's day-to-day financial arrears. Taxpayer did not have access to or sign company checks. There is nothing which indicates taxpayer authorized any company disbursements. There is no indication taxpayer had access to the company's day-to-day financial records during his involvement with the company. Indeed, the information indicates that taxpayer was able to obtain the company's financial records only after the company failed and only after agreeing to take individual responsibility for paying the company accountant's unpaid fees.

Taxpayer has supplied an affidavit describing the extent of his involvement with the company. Taxpayer has also supplied an affidavit prepared by the company's independent accountant. The accountant's affidavit indicates that taxpayer "was only an investor in the [company] and did not participate in [the] company's business decisions." The accountant states that taxpayer was only given the "vice president" title "because the bank required that as a guarantor of the bank loan [taxpayer] had to hold a title of a corporate officer." The affidavit stipulates that the president and secretary/treasurer made "substantially all business decisions"

Under IC 6-3-4-8(g), taxpayer was not a responsible officer and is not personally responsible for the company's unpaid withholding taxes. Although taxpayer was a high ranking company officer, there is nothing to indicate taxpayer had any knowledge of, or exercised any control over, the company's finances. Taxpayer did not have access to or control the company's bank account, did not sign or authorize company checks, and had no say-so in determining when and what order to pay the company's creditors.

Under the standard set out by the Supreme Court in Safayan and under IC 6-8.1-5-1(g), taxpayer has met his burden of proving that the proposed assessment of withholding taxes is wrong. The withholding tax assessments levied against taxpayer should be abated in their entirety.

FINDING

Taxpayer's protest is sustained.